BADAN PERHUBUNGAN UMNO NEGERI PAHANG v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
HADHARIAH SYED ISMAIL JCA
ABU BAKAR JAIS JCA
[CRIMINAL APPEAL NOS: W-05-11-01-2020, W-05-67-02-2020, W-05-68-02-2020, W-05-591-12-2019, W-05-592-12-2019, W-05-94-02-2020, W-05-95-02-2020, W-05-13-01-2020 & W-05-117-03-2020]
1 NOVEMBER 2021

Abstract – *The owner of a bank account who is a mere recipient of monies alleged to be the subject matter of an offence under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, or the proceeds of an unlawful activity, without more, cannot be said to have participated in or abetted the commission of such unlawful activity. Such bare recipient may only be a third party to the impugned transactions, such that the defences under s. 61 of the Act are available to him to defeat the forfeiture proceedings.*

CRIMINAL LAW: *Forfeiture – Proceedings – Appeal – Monies in recipients' bank accounts frozen and seized – Allegations monies were subject matter or evidence relating to commission of offence or proceeds of unlawful activity – Whether monies seized in bank accounts originated from offence under s. 23 of Malaysian Anti-Corruption Commission Act 2009 – Whether there was link between monies in recipients' bank accounts and funds allegedly misappropriated – Whether monies obtained from other sources – Whether monies payments received in good faith for valuable consideration – Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 4 & 56(1)*

There were nine appeals that arose from the prosecution's nine notices of motion for forfeiture applications under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('Act'). From the nine appeals, eight were by the prosecution against the dismissal of the forfeiture application while one appeal was by Badan Perhubungan UMNO Negeri Pahang against the order of the High Court allowing the forfeiture applications. The appeals were divided into three groups as per the following: (i) Badan Perhubungan UMNO Negeri Pahang ('appellant') ('Group one'); (ii) political entities namely Pertubuhan Kebangsaan Melayu Bersatu, Wanita MCA and Badan Perhubungan UMNO Negeri Kedah ('Group two'); and (iii) business entities namely Habib Jewels,

Binsabi, Perano, K & Z Enterprise and Hattatex ('Group three'). In all nine prosecutions, the property sought to be forfeited were monies in the respondents' bank accounts which were frozen and seized based on allegations that they were the subject matter or evidence relating to the commission of an offence under s. 4(1) of the Act or the proceeds of an unlawful activity. The unlawful activity referred to was committed by Dato Seri Mohamad Najib Tun Abdul Razak ('DSN') under s. 4(1) of the Act and s. 23 of the Malaysian Anti Corruption Commission Act 2009 ('MACC Act'). The prosecution alleged that (i) DSN had abused his position as the Chairman of the Board of Advisors of 1 Malaysia Development Berhad ('1MDB') and as the Finance Minister and had caused a huge sum of monies to be transferred from 1MDB's funds to his personal bank account for his own use; (ii) DSN then transferred out the monies to various third parties including the respondents; (iii) during the period of 2011 to 2014, DSN had transferred or paid out monies from his personal account and deposited them into the respondents' bank account; and (iv) the monies remaining in the respondents' bank account which were sought to be forfeited were part of the monies transferred or paid out by DSN to the respondents' bank account and thus were proceeds of the unlawful activity. The respondents admitted that they have received certain amount of monies from DSN *via* personal cheques issued by DSN which were deposited into the respondents' respective bank accounts and the monies have been utilised.

Held (allowing appeal by Badan Perhubungan UMNO Negeri Pahang; dismissing appeals by prosecution):

(1) It was incumbent upon the prosecution to prove that the monies seized in the bank account originated from an offence under s. 23 of the MACC Act allegedly committed by DSN. However, there was no evidence to prove that DSN had committed an offence under s. 23 of the MACC Act. The affidavit evidence of the investigating officer of the predicate offence merely stated the movement of monies from various foreign entities into DSN's bank account. Likewise, there was no explanation or reasons given by the investigating officer as to how she concluded the monies in the bank account were proceeds from an offence under s. 23 of the MACC Act. Instead, the appellant had made a positive assertion that the sum of RM2,479,300.18 was the appellant's monies and not from the monies given by DSN. This assertion was not challenged by the prosecution and was deemed admitted. The only reason the prosecution linked the seized monies to an unlawful activity was simply because the appellant had received RM32,930,000 from DSN and, therefore, whatever amount remaining in the appellant's account was still considered as part of the monies paid by DSN. Thus, the prosecution was making an assumption which was wrong in law. The appellant's appeal was allowed and the order of the High Court was set aside. (para 84)

(2) There was absence of link whatsoever between the monies in the respondents' (in Group two) bank accounts and the funds allegedly misappropriated from 1MDB. It was evident that the offence under s. 23 of the MACC Act had not been proven and, consequentially, the monies which were sought to be forfeited were not traceable to the alleged offence of unlawful activity under s. 23 of the MACC Act. There was also no explanation or reason proffered in the affidavits to arrive at the conclusion that the impugned monies received by DSN from these various entities were gratification from any use of office or position within the scope of s. 23 of the MACC Act. The money trail between 1MDB and DSN had not been established. If the predicate offence was not proven, the issue of proceeds did not arise. (para 87)

(3) From the beginning, the prosecution had admitted that the monies received by the respondents (in Group two) from DSN have been spent. Since the monies given by DSN were no longer in existence, the effect was two-fold: (i) there were no monies from DSN to be forfeited; and (ii) whatever amount remaining in the respondents' account could not be said to be part of the monies given by DSN. To the contrary, the respondents have proven that the monies in their accounts were monies obtained from other sources. The decision of the HCJ to dismiss the prosecution's application solely on the ground the monies given by DSN were no longer in existence were not plainly wrong. (para 87)

(4) The respondents in Group three have adduced evidence and documentary proof to show that they have supplied the goods/services to DSN and the payments from DSN were received in good faith for valuable consideration. The respondents were dealing with DSN's private secretary and the Prime Minister's Office. There is no law that imposes an obligation on the seller to investigate the source of payment. The seller is entitled to accept payment from anybody, including a third party who pays on behalf of the purchaser. (paras 91 & 92)

Case(s) referred to:

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3(1), 4(1), (2)(a), (b), 55, 56(1), (2)(a)(iii), 59, 61, Second Schedule

Malaysian Anti-Corruption Commission Act 2009, s. 23

(Criminal Appeal No: W-05-11-01-2020)

For the appellant - Syed Azimal Amir Syed Abu Bakar, Mohd Shukri Ahmad Mansor & Noorizwa Jurish; M/s Sharif Ridzuan & Co

For the respondent - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs

A *(Criminal Appeal No: W-05-67-02-2020)*
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
For the respondent - Hariharan Tara Singh, Tania Scivetti & Syazwani Mohd Zawawi; M/s Scivetti & Assocs

B *(Criminal Appeal No: W-05-68-02-2020)*
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
For the respondent - Ben Chan & Syazwani Mahmud; M/s Ben Chan

(Criminal Appeal No: W-05-591-12-2019)
C *For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs*
For the respondent - Nadaraja Gopalakrishnan & R Hanita Ramachandran; M/s R Hanita & Assocs

(Criminal Appeal No: W-05-592-12-2019)
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar,
D *Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs*
For the respondent - Khoo Guan Huat & Gooi Yang Shuh; M/s Skrine

(Criminal Appeal No: W-05-94-02-2020)
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
E *For the respondent - Mohd Hasif Hassan & Mohd Khalil Tajuddin; M/s Hasif Kumar & Co*

(Criminal Appeal No: W-05-95-02-2020)
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
F *For the respondent - Thevini Nayagam & Habizan Rahman; M/s Rahman Rohaida*

(Criminal Appeal No: W-05-13-01-2020)
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
For the respondent - Thevini Nayagam & Habizan Rahman; M/s Rahman Rohaida

G *(Criminal Appeal No: W-05-117-03-2020)*
For the appellant - Muhammad Saifuddin Hashim Musaimi, Kamal Baharin Omar, Samihah Rhazali, Nik Haslinie Hashim & Mahadi Abdul Jumaat; DPPs
For the respondent - Mohd Shukri Ahmad Mansor; M/s Asmah Shukri & Co

Reported by Lina E

H

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

I **[1]** There are nine appeals. The appeals are:

(i) W-05-11-01-2020 between *Badan Perhubungan UMNO Negeri Pahang v. PP*;

(ii) W-05-67-02-2020 between *PP v. Pertubuhan Kebangsaan Melayu Bersatu*;

(iii) W-05-68-02-2020 between *PP v. Wanita MCA*;

(iv) W-05-591-12-2019 between *PP v. Badan Perhubungan UMNO Negeri Kedah & 4 Ors*;

(v) W-05-592-12-2019 between *PP v. Habib Jewels Sdn Bhd*;

(vi) W-05-94-02-2020 between *PP v. Binsabi Sdn Bhd*;

(vii) W-05-95-02-2020 between *PP v. Perano Sdn Bhd*;

(viii) W-05-13-01-2020 between *PP v. K & Z Enterprise Sdn Bhd*; and

(ix) W-05-117-03-2020 between *PP v. Hattatex Trading*.

[2] These appeals arose from the prosecution's nine notice of motions for forfeiture applications under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (the Act).

[3] From the nine appeals, eight appeals are by the prosecution against the dismissal of the forfeiture application and one appeal is by Badan Perhubungan UMNO Negeri Pahang against the order of the High Court allowing forfeiture.

[4] All nine appeals were heard together as they raised a common issue ie whether the monies in the respondents' bank account were the subject matter or evidence relating to the commission of an offence under sub-s. 4(1) of the Act or the proceeds of an unlawful activity under s. 23 of the Malaysian Anti-Corruption Commission Act 2009.

[5] For ease of reference, the appeals are divided into three groups as follows:

(i) Group one: Badan Perhubungan UMNO Negeri Pahang;

(ii) Group two: Political entity (Pertubuhan Kebangsaan Melayu Bersatu, Wanita MCA and Badan Perhubungan UMNO Negeri Kedah);

(iii) Group three: Business entity (Habib Jewels, Binsabi, Perano, K & Z Enterprise and Hattatex).

The Prosecution's Nine Forfeiture Applications

[6] As a brief background, the nine notice of motions had the following common features:

(i) All notices of motion were filed on 19 June 2019;

(ii) Each application is supported by the following affidavits:

(a) Affidavit of the Deputy Public Prosecutor, Allan Suman;

A (b) Affidavit of the investigating officer for the predicate offence, Nur Aida binti Ariffin; and

(c) Affidavit of the investigating officer under the Act, Nurul Huda binti Abdul Rahman or Woon Yee Nee.

B (iii) In all nine cases, the property sought to be forfeited was monies in the respondents' bank accounts;

(iv) The monies in the respondents' bank account were frozen on 25 June 2018 and seized on 21 September 2018;

C (v) The prosecution alleges the seized monies were the subject matter or evidence relating to the commission of an offence under sub-s. 4(1) of the Act or the proceeds of an unlawful activity;

(vi) The unlawful activity refers to the unlawful activity committed by Dato' Seri Mohamad Najib bin Tun Abdul Razak (DSN) under s. 4(1) D of the Act and also s. 23 of the Malaysian Anti-Corruption Commission (MACC) Act 2009;

(vii) The prosecution alleges DSN had abused his position as the Chairman of the Board of Advisors of 1 Malaysia Development Berhad (1MDB) and as the Finance Minister and had caused a huge sum of monies to E be transferred from 1MDB's funds to his personal bank account for his own use. DSN, then transferred out the monies to various third party including the respondents herein.

(viii) The prosecution alleges during the period from 2011 to 2014, DSN has transferred or paid out monies from his personal account and F deposited them into the respondents' bank account. The prosecution alleges these monies were proceeds of unlawful activity alleged against DSN.

(ix) The prosecution alleges the monies remaining in the respondents' bank account which were sought to be forfeited is part of the monies G transferred or paid out by DSN to the respondents' bank account and thus were proceeds of the unlawful activity.

(x) It is common knowledge that DSN was charged under s. 23 of the MACC Act 2009 with an addition of 21 charges under s. 4(1) of the Act. H

[7] For ease of reference, we produced below a table to show the amount of monies sought to be forfeited against each respondent.

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NO RESPONDENT	DATE OF FROZEN	DATE OF SEIZURE	AMOUNT OF PROPERTY	BANK & ACCOUNT NO
1. Badan Perhubungan UMNO Negeri Pahang	25.06.2018	21.09.2018	RM 2,479,300.18	Maybank No: 006016211499
2. Pertubuhan Kebangsaan Melayu Bersatu	25.06.2018	21.09.2018	RM192,965,413.61	CIMB No: 8600002579
3. Wanita MCA	25.06.2018	21.09.2018	RM 300,000.00	Maybank: 514057157831
4. Badan Perhubungan UMNO Negeri Kedah & 4 org	25.06.2018	21.09.2018	RM 827,250.00	RHB Bank: 25204600004687
5. Perano Sdn Bhd	25.06.2018	21.09.2018	RM 337,634.78	Maybank: 514598222223
6. K & Z Enterprice Sdn Bhd	25.06.2018	21.09.2018	RM 138,359.60	Hong Leong Bank: 11400009655
7. Hattatex Trading	25.06.2018	21.09.2018	RM 111,590.00	Maybank: 514347209397
8. Habib Jewels Sdn Bhd	25.06.2018	21.09.2018	RM 100,000.00	RHB Bank: 21227310006650
9. Binsabi Sdn Bhd	25.06.2018	21.09.2018	RM 827,250.00	Islamic Affin: 106710000210 RM 277,250.00 Maybank Islamic: 562263022072 RM550,000.00

[8] In respect of the claims against the political entity, the following facts are agreed:

(i) The respondents admitted they had received certain amount of monies from DSN *via* personal cheques issued by DSN which were deposited into the respondents' respective bank accounts; and

(ii) The monies given by DSN have been utilised by the respondents.

[9] In respect of the claims against the business entity, the following facts are agreed:

(i) The respondents have received monies from DSN as payments for services rendered and goods delivered by the respondents to DSN.

(ii) Services have been rendered and goods were delivered.

(iii) The respondents had no knowledge of the source of the monies given by DSN.

A **Background Facts**

Appeal No. 11 (Badan Perhubungan UMNO Negeri Pahang)

[10] Briefly, the facts are as follows. From investigation carried out by MACC, DSN has issued five cheques from his personal bank account and
B deposited them into the appellant's Maybank current account No. 006016211499 (account 1499). The five cheques are as follows:

(i) AmIslamic Bank cheque No. 571553 dated 4 February 2012 for RM760,000.

C (ii) AmIslamic Bank cheque No. 571560 dated 7 May 2012 for RM1,000,000.

(iii) AmIslamic Bank cheque No. 571572 dated 5 August 2012 for RM1,170,000.

D (iv) AmIslamic Bank cheque No. 572084 dated 11 April 2013 for RM15,000,000

(v) AmIslamic Bank cheque No. 571911 dated 20 April 2013 for RM15,000,000.

The total sum of the five cheques is RM32,930,000.

E **[11]** As at 13 May 2019, the appellant's account 1499 had a balance sum of RM2,479,300.18 and this amount was seized. The respondent alleged the seized monies were monies from the 1MDB funds.

[12] At the High Court, the respondent submitted as follows. The appellant
F has failed to prove the said sum of RM32,930,000 were from lawful source. The appellant has failed to prove RM2,479,300.18 is not from the sum of RM32,930,000. The appellant could not have a balance sum of RM2,479,300.18 if not because it has received RM32,930,000 from DSN. That whatever balance sum available in the appellant's bank account will be
G classified as proceed of unlawful activity. Even though the entire RM32,930,000 have been spent, the appellant is bound to refund the same.

[13] In response, learned counsel for the appellant submitted that the said sum of RM32,930,000 received from DSN has been fully spent by the appellant for the benefit of the people in the State of Pahang and the monies
H seized is not from the said sum of RM32,930,000. That the seized monies are from other legal source and belong to the appellant.

[14] The learned High Court Judge found in favour of the respondent and held *inter alia*:

I (i) Based on the affidavit of Nur Aida binti Ariffin and Nurul Huda binti Abd Rahman, the respondent has proved the commission of the predicate offence under s. 23 of the MACC Act by DSN.

(ii) Inference can be made against the appellant that the appellant knew, had reason to believe or had reasonable suspicion that the said RM2,479,300.18 were proceed, of unlawful activity under s. 4(2)(a) of the Act.

(iii) The fact that the appellant admitted receipt of RM32,930,000 but have spent the entire monies does not mean the appellant is not liable to refund the same.

(iv) The appellant, without any reasonable excuse, failed to take reasonable steps to ascertain whether or not the said RM32,930,000 received from DSN were proceeds of unlawful activity.

(v) The appellant could not have RM2,479,300.18 in their bank account if not because they have received RM32,930,000 from DSN.

(vi) The appellant failed to prove RM2,479,300.18 is their own money and not part of the said RM32,930,000.

For the aforesaid findings, the learned High Court Judge concluded that he was satisfied that RM2,479,300.18 seized by the respondent were proceeds of unlawful activity and allowed the respondent's application.

Appeal No. 67 (Pertubuhan Kebangsaan Melayu Bersatu)

[15] The facts in brief are as follows. Between April 2013 and August 2013, DSN has issued seven cheques from his personal bank account and deposited them into the respondent's CIMB current account No. 8600002579 (account 2579). The seven cheques issued by DSN are as follows:

(i) AmIslamic Bank Cheque No. 572079 dated 9 April 2013 for RM100,000,000;

(ii) AmIslamic Bank Cheque No. 571902 dated 19 April 2013 for RM50,000;

(iii) AmIslamic Bank Cheque No. 571903 dated 19 April 2013 for RM50,000;

(iv) AmIslamic Bank Cheque No. 571904 dated 20 April 2013 for RM50,000,000;

(v) AmIslamic Bank Cheque No. 571905 dated 20 April 2013 for RM50,000,000;

(vi) AmIslamic Bank Cheque No. 571948 dated 19 June 2013 for RM25,000,000; and

(vii) AmIslamic Bank Cheque No. 571854 dated 1 August 2013 for RM20,000,000.

The total sum of the seven cheques is RM255,000,000.

[16] As at 13 May 2019, there was RM212,965,413.61 in the respondent's account 2579. The appellant amended the amount to be forfeited to RM192,965,413.61.

[17] The appellant alleged whatever amount left in the respondent's account 2579 were part of the RM255,000,000 received from DSN and thus were proceeds of an unlawful activity alleged against him and ought to be forfeited to the Government of Malaysia.

[18] The respondent resisted the appellant's application and contended:

(i) the monies received from DSN have been fully utilised;

(ii) the seized monies were not part or balance of the monies received from DSN; and

(iii) the monies sought to be forfeited were contributions received from other sources which were as follows:

(a) RM400,000,000 on 11 October 2017 from Seaport Terminal (Johore) Sdn Bhd through CIMB cheque dated 9 October 2017;

(b) RM100,000,000 on 16 April 2018 from Syarikat Seri Yakin Sdn Bhd through CIMB cheque dated 16 April 2018;

(c) RM60,000,000 on 28 March 2018 from Syarikat Temasek Padu Sdn Bhd through a Maybank cheque dated 20 March 2018; and

(d) RM457,731,808.59 in May 2018 from other sources.

[19] In reply, the appellant contended that any amount left in the respondent's bank account is deemed to be proceeds of unlawful activity once they are mixed with the monies deposited by DSN.

[20] The learned High Court Judge agreed with the respondent and dismissed the appellant's application. The decision is derived at based on the following findings of fact:

(i) the amount in the respondent's bank account currently remaining could not be said to be from or part of the amount paid by DSN.

(ii) there is nothing left from the monies paid by DSN into the respondent's bank account left to be forfeited;

(iii) an order for forfeiture under s. 56 of the Act can only be made against the property itself, which is, in this case, the monies deposited by DSN;

(iv) section 56, unlike s. 55 of the Act, makes no provision for the court to forfeit, or order the respondent to pay a penalty equivalent to the same amount sought to be forfeited;

(v) the monies in the respondent's account were monies from other sources. The appellant cannot forfeit monies that were no longer in existence, even if it was to be assumed that the monies were proceeds of unlawful

activity. It is therefore not necessary to go into the merits of the appellant's other grounds for the subject matter of the forfeiture is no longer there.

Appeal No. 68 (Wanita MCA)

[21] In this case, it is not in dispute that DSN had issued two cheques from his personal bank account and deposited them into the respondent's Maybank current account No. 514057157831 (account 7831) as follows:

(i) AmIslamic Bank Cheque No. 571674 dated 11 December 2012 for RM100,000; and

(ii) AmIslamic Bank Cheque No. 571961 dated 7 February 2013 for RM200,000.

[22] As at 17 May 2019, there was a balance sum of RM2,119,626.75 remaining in the respondent's account 7831. The amount seized and sought to be forfeited by the appellant was the sum of RM300,000 given by DSN. The appellant alleged the said RM300,000 were proceed of unlawful activity committed by DSN being monies taken from 1MDB funds.

[23] The respondent objected and contended as follows. The monies given by DSN have been spent. The seized monies were proceeds from the sale of its landed property known as HS (D) 95411, Lot 484, Seksyen 47, Bandar Kuala Lumpur, Daerah Kuala Lumpur together with a 4½ storey shophouse erected on the land. The shophouse was purchased on 27 February 1981 for RM560,000. By a sale and purchase agreement dated 21 July 2017, the said shophouse was sold to Kamal Medical Books Sdn Bhd for RM2,170,000. The respondent substantiated its allegations by producing a copy of the sale and purchase agreement, marked as exh. "HSK-4". The respondent appointed the legal firm of Messrs Koh Nai Kwong to act as their lawyer in the sale and purchase transaction. The full purchase price has been paid by the purchaser as evident by copies of the cheques and cheque deposit receipt marked as exh. "HSK-5". For the aforesaid reasons, the respondent contended the said sum of RM300,000 and the balance sum in the respondent's bank account 7831 are the proceeds from a *bona fide* sale of a shop-house in 2017 and the respondent is the legal owner of the seized monies.

[24] Appeal No. 68 was heard by the same High Court Judge who heard Appeal No. 67. Inevitably, the learned High Court Judge arrived at the same conclusion ie, since the monies paid by DSN have been spent, there is nothing left to be forfeited. His Lordship held the respondent has proven that the sum of RM300,000 sought to be forfeited by the appellant was the proceeds of the sale of the respondent's shophouse, a lawful activity. Accordingly, the learned High Court Judge dismissed the appellant's application.

Appeal No. 591 (Badan Perhubungan UMNO Negeri Kedah & 4 Ors)

[25] In 2012 and 2013, the first respondent has received six cheques from DSN which were deposited into the first respondent's RHB Bank current account No. 25204600004687 (account 4687). The six cheques are as follows:

(i) AmIslamic Bank Cheque No. 572042 dated 25 April 2012 for RM1,000,000;

(ii) AmIslamic Bank Cheque No. 571615 dated 6 June 2012 for RM1,000,000;

(iii) AmIslamic Bank Cheque No. 571697 dated 10 January 2013 for RM2,000,000;

(iv) AmIslamic Bank Cheque No. 571985 dated 6 March 2013 for RM5,000,000;

(v) AmIslamic Bank Cheque No. 572069 dated 5 April 2013 for RM5,000,000; and

(vi) AmIslamic Bank Cheque No. 571949 dated 19 June 2013 for RM1,000,000.

The total sum of the six cheques is RM15,000,000.

[26] As at 25 April 2019, there was a sum of RM1,054,019.22 left in the respondent's account 4687. This amount was seized and sought to be forfeited by the appellant on the basis it is part of the aggregate sum of RM15 million paid by DSN. That this RM1,054,019.22 were proceeds of unlawful activity committed by DSN in relation to an offence under s. 23 of the MACC Act 2009.

[27] The first respondent admitted it has received RM15 million from DSN in 2012 and 2013 but denied the said sum of RM1,054,019.22 is proceed of an unlawful activity. In resisting the appellant's application, the respondent raised three legal points. Firstly, the monies paid by DSN has been utilised for the first respondent's party expenses. Secondly, the appellant failed to show RM1,054,019.22 were proceeds from unlawful activity. Thirdly, RM1,054,019.22 were monies contributed by resources other than from the account of DSN. The other sources are:

(i) RM1,000,000 was deposited into the first respondent's account on 9 January 2017 and 25 January 2017 by a contributory through cash deposit (see exh. "AUK-6" in encl. 9 RR Jilid 3(3) p. 568);

(ii) RM500,000 was deposited into the first respondent's account on 7 November 2017 by contributories *via* cheques No. HLBB128918, HLBB128919 and HLBB128920 (see exh. "AUK-7" in encl. 9 RR Jilid 3(3) p. 568);

(iii) RM2,000,000 was deposited into the first respondent's account on 23 November 2017 by a contributory through cheque No. AMB/ 050385 (see exh. "AUK-8" in encl. 3 RR Jilid 3(3) p. 568);

(iv) RM100,000 was deposited into the first respondent's account on 26 February 2018 by a contributory through cash deposit (see exh. "AUK-9" in encl. 3 RR Jilid 3(3) p. 569);

(v) RM100,000 was deposited into the first respondent's account on 12 March 2018 by a contributory through cash deposit (see exh. "AUK-10" in encl. 3 RR Jilid 3(3) p. 569);

(vi) RM2,120,000 was deposited into the first respondent's account on 2 April 2018 by a contributory through Maybank Cheque No. 072563;

(vii) RM300,000 was deposited into the first respondent's account on 2 April 2018 by a contributory through Maybank Cheque No. 072564;

(viii) RM80,000 was deposited into the first respondent's account on 2 April 2018 by a contributory through Maybank Cheque No. 072565;

(ix) RM67,300 was deposited into the first respondent's account by a contributory through Maybank Cheque No. 072566 (see exh. "AUK-11" in encl. 3 RR Jilid 3(3) p. 570);

(x) RM1,000,000 was deposited into the first respondent's account on 19 April 2018 by a contributory through cash deposit (see exh. "AUK-12" in encl. 3 RR Jilid 3(3) p. 570); and

(xi) RM996,800 was deposited into the first respondent's account on 27 April 2018 by a contributory through cash deposit (see exh. "AUK-13" in encl. 3 RR Jilid 3(3) p. 570).

[28] In a nutshell, the first respondent contended that for the period from January 2018 to June 2018, a sum of RM28,401,704.65 was deposited into the first respondent's account from other sources. This shows the balance sum of RM1,054,019.22 in the first respondent's account is from other sources and not from the monies paid by DSN.

[29] Upon considering the law, the facts and submissions of parties, the learned High Court Judge dismissed the appellant's application on three grounds: (i) There was insufficient evidence to prove the predicate offence under s. 23 of the MACC Act 2009 has been committed by DSN. Since predicate offence is not proved, the issue of unlawful proceeds does not arise; (ii) The monies paid by DSN have been spent and there is nothing left to forfeit; and (iii) The appellant failed to prove the seized monies ie, RM1,054,019.22 is the proceeds of an unlawful activity.

Appeal No. 592 (Habib Jewels Sdn Bhd)

[30] Briefly, the facts are as follows. The respondent carries on the business of selling jewellery, gold and gemstones.

[31] In 2013 and 2014, DSN purchased jewelleries from the respondent. In November 2013 and June 2014, the respondent received two cheques from DSN for the sale of jewelleries from the respondent to DSN as follows:

(i) AmIslamic Bank Cheque No. 000094 dated 27 November 2013 for RM90,000 which was deposited into the respondent's RHB Bank current account No. 21227310018356 (account 8356); and

(ii) AmIslamic Bank Cheque No. 000377 dated 23 June 2014 for RM100,000 which was deposited into the respondent's RHB current account No. 21227310006650 (account 6650).

[32] On 21 September 2019, the appellant seized monies in the sum of RM485.66 in the respondent's account No. 8356 and a sum of RM100,000 in the respondent's account No. 6650.

[33] On 1 September 2019, the appellant filed a notice of motion to remove RM485 which was initially sought to be forfeited. The amendment application was allowed by the court on 13 September 2019. Hence, the appellant seeks to forfeit RM100,000 in the respondent's account No. 6650.

[34] The appellant alleged RM100,000 is part of the sum of RM190,000 paid by DSN to the respondent *via* the two cheques and is the proceeds of an unlawful activity committed by DSN.

[35] The respondent denied the appellant's allegations and contended that the two cheques were received by the respondent in good faith for valuable consideration for the sale and purchase of jewelleries. To substantiate their allegations, the respondent exhibited sale receipt dated 3 December 2013 as "SNR-02" and sale receipt dated 25 June 2014 as "SNR-05".

[36] Before the High Court, the learned DPP for the appellant submitted the respondent has failed to prove the sum of RM100,000 sought to be forfeited is from a lawful source. It is further submitted that the respondent ought to have reason to suspect the financial sources of DSN and the respondent did not comply with Bank Negara Malaysia's Anti-Money Laundering guidelines.

[37] On the other hand, the respondent submitted that the appellant has failed to prove on the balance of probabilities that the seized monies are the proceeds of an unlawful activity on the grounds:

(i) the appellant has failed to show with sufficient evidence that a predicate offence has been committed;

(ii) the respondent has no involvement in the commission of any offence and did not aid or abet in any such offence;

(iii) the respondent has shown that the monies sought to be forfeited were received for valuable consideration and in good faith for the lawful sale and purchase of jewellery in the ordinary course of business;

(iv) the monies sought to be forfeited have been together with other monies from legitimate sources and the appellant has failed to show which monies were from illegal as compared to legitimate sources;

(v) compliance with Bank Negara Malaysia's policies is not a relevant consideration for this forfeiture application as the respondent had no reason to suspect the legitimacy of DSN's income.

[38] The learned High Court Judge agreed with the respondent and dismissed the appellant's application. The learned High Court Judge's finding of fact was that the monies sought to be forfeited were received by the respondent as a valuable consideration in good faith for the sale of jewellery to DSN in the course of the respondent's ordinary business as jeweller. That the sale and purchase were substantiated with contemporaneous documents. More so the appellant did not dispute the sale transaction. Hence, based on *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281, the respondent's averment that the monies received by the respondent from DSN were payment for the sale and purchase of jewellery is deemed admitted. In conclusion, the learned High Court Judge said he was not satisfied that the requirements under s. 56 of the AMLATFPUAA have been met to justify the granting of an order for forfeiture as applied for.

Appeal No. 94 (Binsabi Sdn Bhd)

[39] Briefly, the facts are as follows. The respondent carries on the business of supplying logistic equipment (technical and canopies) for corporate functions. In 2011 and 2013, the respondent has supplied the equipment for an official function at the official residence of the Prime Minister and for general election at Pekan, Pahang, respectively.

[40] In July 2011 and March 2013, the respondent received three cheques from DSN for the services rendered to him as follows:

(i) AmIslamic Bank Cheque No. 562728 dated 4 July 2011 for RM350,000 which was deposited into the respondent's Maybank current account No. 562263022072 (account 2072);

(ii) AmIslamic Bank Cheque No. 571977 dated 5 March 2013 for RM200,000 which was deposited into the respondent's Maybank current account No. 562263022072;

(iii) AmIslamic Bank Cheque No. 571993 for RM277,250 which was deposited into the respondent's Affin Bank current account No. 106710000210 (account 0210).

[41] As at 27 May 2019, the amount remaining in the respondent's Maybank account 2072 was RM1,233,237.33 and the amount in Affin Bank account 0210 was RM558,038.42.

[42] In this forfeiture application, the appellant sought to forfeit the sum of RM277,250 in the respondent's Affin Bank account 0210 and RM550,000 in the respondent's Maybank account 2072.

[43] The appellant alleged that the monies paid by DSN into the respondent's bank accounts were proceeds of the offences alleged against him.

[44] The respondent resisted the forfeiture application and contended as follows. The respondent received the monies from DSN in good faith as payment for the services rendered. The respondent substantiated its contention with invoices marked as exhs. "DHSAA- 4" and "DHSAA-11". As a business entity, the respondent had utilised the monies received from DSN to pay its suppliers and workers. That from the time the respondent received the monies from DSN to the time the monies were seized, the respondent also received payments from other businesses. In gist, the respondent alleged that the current amount in its bank accounts could not be said to be part of, or wholly from the amount paid by DSN.

[45] In response, the appellant contended that any amount in the respondent's bank accounts is deemed to be classified as proceeds of an unlawful activity, once they are mixed with the amount paid by DSN.

[46] Having considered the evidence in its entirety, the learned High Court Judge concluded at para. 28 of His Lordship's grounds of judgment as follows:

> [28] It is clear that the funds in the respondent's bank accounts could not be credibly said to be from DSNR's payments, and were instead funds from other sources. The prosecution could not seek to forfeit monies which were no longer in existence, or credibly identified, even if it was assumed that the monies were proceeds of unlawful activities. It is therefore not necessary to go into the merits of the prosecution's application, nor the respondent's other grounds, for the subject matter of the forfeiture is no longer there. I am therefore left with no alternative but to dismiss the prosecution's application.

Appeal No. 95 (Perano Sdn Bhd)

[47] The respondent carries on the business of selling textile and headscarves. On 17 September 2014 and 19 September 2014, members of UMNO Pekan, Pahang purchased headscarf from the respondent for the total sum of RM350,000. As proof of the sale, the respondent produced a cash bill, marked as exh. 2.

[48] In October 2014, the respondent received one cheque from DSN for the goods sold and delivered as follows:

(i) AmIslamic Bank Cheque No. 000322 dated 9 October 2014 for the sum of RM350,000 which was deposited into the respondent's Maybank current account No. 514598222223 (account 2223).

[49] The appellant alleged that the payment made by DSN into the respondent's bank account 2223 were proceeds of the offences alleged against him.

[50] As at 13 May 2019, there was a sum of RM337,634.78 left in the respondent's bank account 2223.

[51] The appellant alleged the said sum of RM337,634.78 were liable to be forfeited as it was the proceeds of an unlawful activity committed by DSN under s. 4(1) of the Act and also s. 23 of the MACC Act 2009.

[52] The respondent contended that there had since been many transactions in its account, where not only the respondent has spent the RM350,000 sought to be forfeited, but it had also received monies larger than RM350,000. In gist, the respondent contended the amount left in its account could not be said to be part of or wholly from the amount paid by DSN.

[53] In response, the appellant contended the respondent would not have that much of money in its bank account had it not been for the payment made by DSN. It is further contended that any amount in the respondent's bank account is deemed to be classified as proceeds of unlawful activity once they are mixed with the amount paid by DSN.

[54] On perusal of the respondent's bank statement, the learned High Court Judge found there were multiple transactions in the respondent's bank account between the time DSN made payment to the time the respondent's bank account was frozen. That in fact there were payments made into the respondent's account that were more than RM350,000 paid by DSN. This, according to the learned High Court Judge lends credence that the monies deposited by DSN in October 2014 had been spent, if not entirely, most of it.

[55] Based on the above finding, the learned High Court Judge concluded "It is clear that the funds in the respondent's bank account could not credibly be said to be from DSN's payment and were instead funds from other sources. The prosecution could not forfeit monies which no longer exist or credibly identified as proceeds of unlawful activity". Therefore, His Lordship dismissed the appellant's application.

Appeal No.13 (K & Z Enterprise Sdn Bhd)

[56] The respondent carries on the business of selling textile, clothing and garment accessories. In 2013, the respondent has supplied 148,877 pieces of t-shirt to the Secretariat Hal Ehwal Bandar, Pemuda UMNO Malaysia. To prove the sale and purchase transaction, the respondent produced an invoice dated 28 April 2013, marked as "KZ-6".

[57] In March 2013, the respondent received one cheque from DSN for the supply of the said 148877 t-shirts as follows:

(i) AmIslamic Bank Cheque No. 571992 for RM1,125,000 which was deposited into the respondent's Hong Leong Bank account No. 11400009655 (account 9655).

[58] As at 13 May 2019, the amount in the respondent's account 9655 was RM138,359.60. This is the amount the appellant sought to forfeit to the Government of Malaysia on the premise it was the proceeds of unlawful activity committed by DSN under s. 4(1) of the Act and s. 23 of the MACC Act 2009.

[59] At the High Court, the appellant argued that the respondent knew or had reason to believe that the said RM138,359.60 is the proceeds of unlawful activities because the t-shirts were supplied to Media Prima Berhad, payment was claimed from Secretariat Hal Ehwal Bandar, Pemuda UMNO Malaysia and payment *via* cheque was made by DSN. The appellant alleged the three-layered arrangements create a reasonable suspicion, but the respondent did not take steps under s. 4(2)(b) of the Act. Therefore, the appellant submitted that inference can be made that the respondent had reasonable suspicion that the property was the proceeds of an unlawful activity.

[60] The appellant also argued that RM138,359.60 was monies from 1MDB's funds. That the respondent would not have a balance sum of RM138,359.60 if not because it received a cheque from DSN. That the balance amount in the respondent's bank account is still classified as proceeds of unlawful activity within the meaning of s. 3(1) of the Act. That the respondent has failed to prove on the balance of probabilities the sum of RM138,359.60 was not monies from the cheque given by DSN.

[61] In response, the respondent argued as follows. The appellant must show that the respondent knew or had reason to believe that RM138,359.60 was the proceeds of unlawful activity. The transaction to supply t-shirts is a lawful ordinary business of the respondent. The respondent had no reason to believe or suspect that the payment received *via* cheque is the proceed of illegal activity. It is none of the respondent's business or duty to ask DSN whether the monies in the cheque is from legal or illegal source. The respondent had no direct dealing with DSN. The respondent conducts its business in good faith for valuable consideration. The respondent could not be faulted and penalised for carrying out its ordinary business. The cheque received also did not have the name of the account holder.

[62] The learned High Court Judge found in favour of the respondent. His Lordship dismissed the appellant's application on the following grounds: A

(i) the appellant failed to prove on the balance of probabilities that the sum of RM1,125,000 given by DSN to the respondent was from the four transfers of monies into DSN's bank account because the withdrawal amount is much more than the amount received by DSN. Therefore, RM138,359.60 cannot be said to be from proceeds of unlawful activity; B

(ii) alternatively, RM1,125,000 received by the respondent is payment for the supply of 148,877 t-shirts and payment was received in good faith;

(iii) the appellant has failed to prove that the respondent knew or had reason to believe that the cheque for RM1,125,000 is proceeds from unlawful activity. C

Appeal No. 117 (Hattatex Trading)

[63] The respondent was in the business of supplying, selling and sewing of cloth. In 2012 and 2013, DSN has ordered goods from the respondent. To prove the sale and purchase transaction, the respondent produced invoices No. 3642, 3620, 3634 as exh. "MH-1" and invoice No. 4108 as exh. "MH-2". D

[64] In August 2012 and August 2013, the respondent received two cheques from DSN for the supply of the goods as follows: E

(i) AmIslamic Bank Cheque No. 571650 dated 2 August 2012 for RM74,590 which was deposited into the respondent's Maybank current account No. 514347209397;

(ii) AmIslamic Bank Cheque No. 000053 dated 26 August 2013 for RM37,000 which was deposited into the respondent's Maybank current account No. 514347209397 (account 9397). F

The total sum of the two cheques is RM111,590.

[65] As at 13 May 2019, the available balance amount in the respondent's account 9397 is RM120,239.71. G

[66] Investigation by MACC revealed the two cheques amounting to RM111,590 were issued by DSN from his personal account.

[67] The appellant sought to forfeit RM111,590 on the premise this sum of monies were proceeds of unlawful activity in relation to an offence committed by DSN under s. 23 of the MACC Act 2009, the commission of which the appellant claims has been proven on the balance of probabilities. H

[68] The respondent denied RM111,590 was proceeds of an unlawful activity. The respondent contended the said RM111,590 was payment for goods sold and delivered to the Prime Minister's Office. The respondent substantiated their claims with invoices. The respondent contended they I

A received RM111,590 in good faith for valuable consideration and they had utilised the monies to pay the supplier of the goods. It is contended that the respondent would suffer great losses if RM111,590 is forfeited to the Government of Malaysia because they have supplied the goods. For the aforesaid contentions, the respondent submitted that the RM111,590 seized
B from its bank account is their monies, belongs to them and is not part of the two cheques given by DSN.

[69] The learned High Court Judge found in favour of the respondent and dismissed the appellant's application. In arriving at his decision, the learned High Court Judge made the following finding of facts:

C

(i) the respondent did not know, had no reason to believe or had no reasonable suspicion that the said sum of RM111,590 seized was the proceeds of an unlawful activity;

(ii) the purchase and payment for the goods were handled by the private
D secretary of the Prime Minister. The respondent never had any direct dealing with DSN;

(iii) there is no necessity for the respondent to take a reasonable step to ascertain whether or not the said sum of RM111,590 paid by DSN was the proceeds of an unlawful activity;

E

(iv) the appellant has failed to prove on the balance of probabilities that the said sum of RM111,590 was the proceed of an unlawful activity;

(v) in the alternative, RM111,590 is payment for goods sold and delivered.

The Law On Forfeiture

F

[70] Section 56 of the Act reads as follows:

> 56. Forfeiture of property where there is no prosecution
>
> (1) Subject to s. 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under sub-s. 4(1) or
G a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
>
> H (a) the subject – matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> I (d) the instrumentalities of an offence.
>
> (2) The judge to whom an application is made under sub-s. (1) shall make an order for the forfeiture of the property if he is satisfied:
>
> (a) that the property is:

(i) the subject-matter or evidence relating to the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) the proceeds of an unlawful activity; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under sub-s. (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether the property is:

(a) the subject matter or evidence relating to the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

[71] Forfeiture proceedings under s. 56 of the Act is subject to s. 61 which reads as follows:

Bona fide third party

61. (1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties;

(2) The court making the order of forfeiture under sub-s. 28L(1) or s. 55 or the judge to whom an application is made under sub-s. 28L(2) or 56(1) shall cause to be published a notice in the *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited;

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under sub-s. 4(1) or Part IVA, or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[72] Based on the wordings of s. 56, it is clear that an order for forfeiture under s. 56(2) of the Act can only be made by the High Court Judge if he is satisfied that the monies in the respondents' bank account were the subject matter or evidence in relation to the commission of an offence under sub-s. 4(1) of the Act, or proceeds of an unlawful activity under s. 23 of the MACC Act; and there is no purchaser in good faith for valuable consideration in respect of the monies in the appellant's and the respondents' bank account.

[73] Therefore, the core issue in all nine appeals is whether the monies in the respondents' bank accounts are the subject matter of the offence of money laundering under s. 4(1) of the Act or the proceeds of an unlawful activity under s. 23 of the MACC Act.

[74] Section 4(1) of the Act reads:

4. Offence of Money Laundering

(1) Any person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

(2) For the purposes of sub-s. (1), it may be inferred from any objective factual circumstances that:

(a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or

(b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

[75] "Proceeds of an unlawful activity" is defined under s. 3(1) of the Act as follows:

"proceeds of an unlawful activity" means any property, or any economic advantage or economic gain from such property, within or outside Malaysia:

(a) which is wholly or partly-

(i) derived or obtained, directly or indirectly, by any person from any unlawful activity;

(ii) derived or obtained from a disposal or other dealings with the property referred to in sub-paragraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in sub-paragraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in sub-paragraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of sub-paragraph (a)(i), (ii) or (iii).

[76] The expression "unlawful activity" is defined under s. 3(1) of the Act to mean *inter alia* any activity which constitutes any "serious offence". The term serious offence is defined in the same section as to include any of the offences specified in the Second Schedule of the Act.

[77] In this case, the serious offence is the offence under s. 23 of the MACC Act, being one of the predicate offences specified in the Second Schedule of the Act.

[78] Section 23 of the MACC Act reads as follows:

(1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

(2) For the purposes of sub-s. (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes

any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

(3) For the avoidance of doubt, it is declared that, for the purposes of sub-s. (1), any member of the administration of a state shall be deemed to use his office or position for gratification when he acts contrary to sub-s. 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the constitution or Laws of Constitution of that State.

(4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

[79] Since the prosecution alleged that the monies in the respondents' bank accounts are the proceeds of the commission of an offence under s. 23 of the MACC Act by DSN, the following elements have to be proved:

(i) DSN has committed an offence under s. 23 of the MACC Act;

(ii) The monies in the respondents' bank account were the proceeds of the offence committed by DSN; and

(iii) The respondents knew the monies in their bank account were the proceeds of the offence committed by DSN.

[80] In these cases, it is not in dispute that the respondents herein did not participate or abet the commission of the unlawful activity. They are mere recipients of monies given by DSN. In the circumstances, we are of the view that in a forfeiture proceedings under s. 56, the owner of the account, the appellant or the respondents herein, can challenge the applications by showing among others that they are *bona fide* purchasers, have a legitimate legal interest in the property, did not in any way participate, colluding or involve in the commission of the concerned offence or offences, lacked knowledge and did not in any way assisting to avoid forfeiture of the property. To a certain extent, they can be treated as third parties and the defences provided under s. 61 of the Act may be relied upon to defeat the forfeiture proceedings.

Our Decision

Group One: Badan Perhubungan UMNO Negeri Pahang

[81] The appellant's main complaint in this appeal is the learned High Court Judge has failed to consider paras. 39 to 41 of the appellant's affidavit in reply which states that the sum of RM32,930,000 received from DSN has been utilised and the sum of RM2,479,300.18 seized by the respondent is the

appellant's monies and is not part of the monies given by DSN. Both facts were not disputed or challenged by the respondent. Instead, the learned High Court Judge had stated that para. 41 in the appellant's affidavit in reply is a bare assertion.

[82] For convenience, we reproduce the said paras. 39-41 of the affidavit in reply affirmed by Mohd Soffi bin Abdul Razak, the Treasurer of Badan Perhubungan UMNO Pahang below:

> 39. Saya juga mengesahkan bahawa kesemua wang yang telah diterima daripada DSNR melalui 5 cek di ekshibit "NHAR-11" dalam afidavit IO AMLA telah habis digunakan sepenuhnya untuk aktiviti responden sebagai sebuah cawangan parti politik di Negeri Pahang.
>
> 40. Saya juga mengesahkan bahawa wang daripada DSNR melalui cek di ekshibit "NHAR-11" dalam afidavit IO AMLA tersebut telah digunakan untuk manafaat rakyat.
>
> 41. Saya mengesahkan bahawa wang RM2,479,300.18 yang disita di dalam akaun bank responden adalah milik responden yang diperolehi bukan daripada 5 cek di dalam ekshibit "NHAR-11".

[83] In her affidavit in reply to the affidavit of Mohd Soffi bin Abdul Razak, Nurul Huda binti Abd Rahman (the investigating officer of AMLATFPUA) averred in paras. 8 and 9 as follows:

> 8. Bagi menjawab kepada perenggan 39 dan 40 afidavit jawapan tersebut, ingin saya menegaskan bahawa isu tersebut bukanlah isu yang relevan. Apa yang penting ialah responden telah memperoleh secara tidak langsung sebahagian hasil daripada aktiviti haram dari kesalahan predikat yang telah pun dipertuduhkan. Walaubagaimanapun pihak pemohon meletakkan beban pembuktian yang penuh terhadap pernyataan responden ini.
>
> 9. Bagi menjawab perenggan 41 dan 42 afidavit jawapan tersebut, saya mengulangi pernyataan saya di perenggan 8.

[84] The appellant contended that, as the investigating officer under the Act, Nurul Huda binti Abdul Rahman is unable to confirm or deny that the sums of RM32,930,000 have been spent. It is insufficient for the investigating officer to merely state the fact that the monies no longer exist. We are dealing with fact. Not opinion. Forfeiture application is tried by way of affidavit evidence. Based on the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609, the appellant submitted the facts deposed by Mohd Soffi bin Abdul Razak in paras. 39 to 41 of the appellant's affidavit in reply is deemed admitted by the respondent. We agree with the appellant. Failure to reply on the non-existence of RM32,930,000 means the respondent has admitted that the sum of RM32,930,000 given by DSN no longer exist and the seized monies could not be part of or related to the sum of RM32,930,000. Therefore, it is incumbent on the respondent to prove that the monies seized in the appellant's bank account originate from an offence

under s. 23 of the MACC Act 2009 allegedly committed by DSN. We find there was no evidence proffered by the respondent to prove DSN has committed an offence under s. 23 of the MACC Act. The affidavit evidence of Nur Aida binti Ariffin, the investigating officer of the predicate offence merely states the movement of monies from the various foreign entities into DSN's bank account. Likewise, there was no explanation or reasons given by Nurul Huda as to how she concluded the monies in the appellants' bank account were proceeds from an offence under s. 23 of the MACC Act. Instead, the appellant has made a positive assertion that the sum of RM2,479,300.18 was the appellant's monies and not from the monies given by DSN. This assertion is not challenged by the respondent and is deemed admitted. This being the case, we agree with the appellant that the learned High Court Judge had erred in His Lordship's ruling that para. 41 of Mohd Soffi's affidavit is a bare assertion. The only reason the respondent linked the seized monies to an unlawful activity is simply because the appellant had received RM32,930,000 from DSN and therefore, whatever amount remaining in the appellant's account is still considered as part of the monies paid by DSN. Thus, the respondent is making an assumption, which is wrong in law. The law requires the respondent to prove the said RM2,479,300.18 is derived from an offence under s. 23 of the MACC Act allegedly committed by DSN within the meaning of s. 56(2)(a)(iii) of the Act. We find the respondent has failed to do so. On this ground alone, we find merit in the appellant's appeal. We, therefore allow the appeal and set aside the order of the High Court.

Group Two: Pertubuhan Kebangsaan Melayu Bersatu; Wanita MCA; and Badan Perhubungan UMNO Negeri Kedah & Ors

[85] In these appeals, the appellant has raised an issue that the learned High Court Judges had erred in failing to make an order for forfeiture under s. 56 and a pecuniary penalty order under s. 59 of the Act.

[86] The appellant contended they have satisfied the requirements in s. 56(2)(a)(iii) of the Act based on the following facts:

(i) the affidavit of Nur Aida binti Ariffin and Nurul Huda bt Abd Rahman proved the seized monies are the proceeds of an offence under s. 23 of the MACC Act committed by DSN;

(ii) the respondents admitted they have received monies from DSN's bank account;

(iii) the monies in DSN's bank account originates from 1MDB's funds;

(iv) the respondents would not have the seized monies if not because DSN gave them the monies;

(v) the respondents have obtained an economic gain flowing from the proceeds of an unlawful activity;

(vi) irrespective of whether the entire monies received from DSN have been utilised, whatever balance amount remaining in the respondents' bank account is classified as the proceeds of an unlawful activity;

(vii) the learned High Court Judges had erred in dismissing the forfeitures' application solely on the ground the monies received from DSN have been utilised and there are no more monies in the respondents' account which can be associated or linked to the monies given by DSN;

(viii) since the courts have found that the respondents' account no longer has the monies given by DSN, the High Court should make a pecuniary penalty order under s. 59 of the Act.

[87] We find no merit in the appellant's contentions for the following reasons:

(i) Requirements under s. 56(2)(a)(iii) of the Act have not been met.

(a) There is insufficient evidence to satisfy the High Court that the monies seized are the subject matter or evidence relating to the commission of an offence or proceeds of unlawful activity under s. 23 of the MACC Act.

(b) The affidavit deposed by Nurul Huda bt Abd Rahman merely disclosed the movement of the monies deposited into and transferred out of DSN's bank account between 22 March 2013 until 10 April 2013 without proving the origin of the monies. There is not a shred of documentary evidence produced by the appellant in order to support their allegation that the monies in DSN's bank account and the respondents' bank account originated from 1MDB's funds.

(c) The monies deposited by DSN into the respondents' bank accounts have co-mingled with the respondents' own monies from other sources. The appellant admitted that the funds in the respondents' bank accounts have mixed with the monies from DSN. Despite the admission, the appellant erroneously concluded that any amount left in the respondents' bank account is deemed to be classified as proceeds of an unlawful activity once they are mixed with the monies deposited by DSN.

(d) The appellant merely show the transfer of money from DSN's bank account to the bank account of the respondents and nothing more. The court should not be left on its own to make the connections between the money received and the alleged unlawful activity purportedly committed by DSN.

(e) In contending the seized monies is part of the monies given by DSN, the appellant is making an assumption or presumption when the law requires proof on the balance of probabilities. The appellant has failed to prove the link between the seized monies and the offence under s. 23 of the MACC Act.

(f) At para 13 of her affidavit, Nurul Huda binti Abdul Rahman simply averred that monies were deposited into the respondents' bank accounts from DSN's first account through cheques and erroneously concluded that the said monies were proceeds of unlawful activity in relation to an offence under s. 23 of the MACC Act. There was no explanation in her affidavit as to how the monies seized could be linked to the offence under s. 23 of the MACC Act.

(g) As the investigating officer for the predicate offence, Nur Aida binti Ariffin has failed to set out clearly in her affidavit sufficient evidence to support her findings that an offence under s. 23 of the MACC Act has been committed. She simply begins most of her averments in the affidavit by saying "based on her investigation" without disclosing in details whose statements were recorded as part of her investigation.

(h) We are satisfied that there was absence of link whatsoever between the monies in the respondents' bank accounts and the funds allegedly misappropriated from 1MDB. It is therefore, evident that the offence under s. 23 of the MACC Act has not been proven and consequentially, the monies which are sought to be forfeited were not traceable to the alleged offence of unlawful activity under s. 23 of the MACC Act.

(i) From the appellant's affidavits and the documents exhibited thereto, it has not been shown that the monies which had been received by DSN from the various entities is a result of his office or position as the Chairman of the Board of Advisors of 1MDB or as the Minister of Finance or from any action or decision taken by DSN in any of these capacities. Additionally, it has not been demonstrated how DSN had used his position for gratification or money laundering other than merely showing that DSN had received monies from various entities without any clear evidence of impropriety.

(j) There is no explanation or reason proffered in the affidavits to arrive at the conclusion that the impugned monies received by DSN from these various entities are gratification from any use of office or position within the scope of s. 23 MACC Act. No detailed narrative was given as to the investigation conducted and the sources of information which satisfied the appellant that the predicate offence under s. 23 of the MACC Act has been committed or that the monies in the account of DSN are the proceeds from an unlawful activity. The money trail between 1MDB and DSN has not been established.

(k) From the affidavits filed by the appellant, the nexus between DSN's involvement in matters pertaining to 1MDB and the subsequent depositions of monies into his account is tenuous, such that it

plainly cannot be said that the predicate offence under s. 23 of the MACC Act has been committed. If the predicate offence is not proved, the issue of proceeds deriving therefrom does not arise.

(ii) The monies received from DSN have been utilised.

(a) From the beginning, the appellant has admitted that the monies received by the respondents from DSN herein have been spent. The wordings used in s. 56(1) is "... apply to a judge of the High Court for an order of forfeiture of that property ...". We find the learned High Court Judges were correct in interpreting the word "that property" refers to a specific property. In the instant appeals, "that property" refers to the monies received by the respondents from DSN. Since the monies given by DSN were no longer in existence, the effect are two folds: (i) there are no monies from DSN to be forfeited; and (ii) whatever amount remaining in the respondents' account cannot be said to be part of the monies given by DSN. To the contrary, the respondents have proved to the satisfaction of the court that the monies in the respondents' account were respondents' monies obtained from other sources. We find the decision of the learned High Court Judges to dismiss the appellant's application solely on the ground the monies given by DSN were no longer in existence were not plainly wrong. We see no good reason to disturb the finding of facts made by the trial courts.

(iii) Pecuniary penalty order under s. 59 of the Act rightly refused.

(a) Section 59 of the Act provides as follows:

59. Pecuniary orders

(1) For the purpose of proceedings under s. 55 or 56, the court shall issue a pecuniary penalty order against a person from whom property is forfeited in respect of benefits derived by the person from:

(a) the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

(2) The court may, if it considers appropriate, assess the value of the benefits so derived and order that person to pay to the Federal Government a pecuniary penalty equivalent to that amount.

(3) Where a forfeiture order has been made under s. 55 or 56 against any property which is:

(a) the subject matter or evidence relating to the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the pecuniary penalty to be paid under sub-s. (2) shall be reduced by any amount equivalent to the value of the property as at the time of the making of the order under sub-s. (2) and any such penalty shall be recoverable as a civil debt due to the Government of Malaysia and shall not be subject to any period of limitation prescribed by any written law.

(4) In determining whether the benefit derived from -

(a) the commission of an offence under sub-s. 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

the court shall apply the standard of proof required in civil proceedings.

(b) Before us, the appellant argued the learned High Court Judges had erred in failing to apply s. 59. We find no merit in the argument. A plain reading of the section show s. 59 is not applicable in the instant cases. Our view is s. 59 can only be invoked if the appellant's forfeiture application under s. 56 is allowed by the court, which is not the case here. In addition, s. 59 is not specifically pleaded in the appellant's notice of motion. It is trite law that the court cannot grant any relief which was not asked for and not proven by the applicant.

(c) In Appeal No. 67, the learned High Court Judge had taken note that the appellant did not submit as to whether it could seek to forfeit an amount equivalent to the monies deposited by DSN. His Lordship has referred to s. 55 and not s. 59. At para. 30 of the grounds of judgment (at p. 21 record of appeal jilid 1), His Lordship concluded:

> Section 55 of the Act, unlike s. 56, concerns an application for forfeiture against a person charged with an offence under s. 4(1) of the Act, or a terrorism financing offence. Similar to s. 56, it makes provision for the forfeiture of a property that is the subject matter of the offence that the accused is charged for. However, unlike s. 56, s. 55 makes provision for a situation where the

property sought to be forfeited "has been disposed of, diminished in value or cannot be traced", in which case the court is empowered to order the respondent to pay as a penalty a sum equivalent to the value of such property. This is clearly provided for under s. 55(2) of the Act. There is no corresponding provision under s. 56.

[88] We find the approach adopted by the learned High Court Judge is correct. His Lordship merely explained the difference between s. 55 and s. 56, but the outcome to the appellant remain the same.

[89] For the aforesaid reasons, we dismissed the appellant's appeals and affirmed the decision of the High Court in all three cases.

Group Three : Habib Jewels Sdn Bhd; Binsabi Sdn Bhd; Perano Sdn Bhd; K & Z Enterprise Sdn Bhd and Hattatex Trading

[90] Under this group, the appellant contended the learned High Court Judges had erred:

(i) In only considering one issue namely money received from DSN was received as payment for services rendered and goods delivered;

(ii) In holding that the appellant has failed to show the respondents knew or had reason to believe payments from DSN *via* cheques are from an unlawful activity.

[91] We find no merit in both points raised by the appellant. The respondents in all five cases have adduced evidence and documentary proof to show that they have supplied the goods/services to DSN and the payments from DSN were received in good faith for valuable consideration. It is not in dispute that the respondents did not deal directly with DSN in the transactions. It is also not disputed that the cheques issued for payments do not have the name of the account's holder namely DSN.

[92] The learned High Court Judges in all five cases have found as a fact that the sale and purchase transactions between the respondents and DSN were *bona fide* and lawful business. The High Court Judges also found the monies in the respondents' accounts belong to the respondents being monies received in good faith for value. We know of no law that imposed an obligation on the seller to investigate the source of payment. The law as it stands today is, as long as the transaction is not against the law, the seller is entitled to accept payment from anybody, including a third party who pays on behalf of the purchaser. In these cases, the respondents were dealing with DSN's private secretary and the Prime Minister's Office. In the circumstances, the High Court Judges held that there is no reason for the respondents to suspect they will receive payments from illegal monies. In fact, the appellant's affidavit did not aver that the respondents knew or had reason to suspect that the payments received were from illegal sources. We agree with all the findings of facts made by the High Court Judges. To accede

to the appellant's argument would result in losses to the respondents because they had delivered the goods and services. Whilst the objective of the Act is to prevent any person from gaining the proceeds of an unlawful activity, we do not think the Act is intended to cause injustice to a *bona fide* purchaser by forfeiting their legitimate hard-earned monies.

[93] Accordingly, we find there is no appealable error that warrants appellate intervention. Therefore, we dismissed the appellant's appeals and affirmed the decision of the High Court in all five cases.